No. 86-1246

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1986

OLD ORCHARD BRANDS, INC., and
R.V. SAUR AND SONS ORCHARDS, INC.,

Petitioner,

v

STATE OF MICHIGAN, DEPARTMENT OF AGRICULTURE, and 63rd JUDICIAL DISTRICT COURT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WAS THE MICHIGAN AGRICULTURAL COMMODITIES MARKETING ACT AN "EXISTING STATE LAW" WHEN THE AGRICULTURAL FAIR PRACTICES ACT WAS ENACTED, AND THUS EXEMPT FROM PREEMPTION BY 7 USC 2305(d)?

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JURISDICTION

Respondents do not deny that this Court has jurisdiction under 28 USC § 1257(3). Because the Michigan Supreme Court denied discretionary review, however, it is the judgment of the Michigan Court of Appeals which is reviewable and not the Order of the Michigan Supreme Court as indicated on the Petition.

STATEMENT OF THE CASE

Petitioners are an apple grower and processor of apple products who must pay mandatory assessments to the Michigan Apple Committee, a commodity promotion group organized under authority of the Agricultural

Commodities Marketing Act, MCL 290.651 *et seq;* MSA 12.94(21) *et seq* ["Michigan Act"], to sponsor generic advertising, research and promotion for Michigan apples.

Petitioners sought a declaratory judgment against the Michigan Act in state court, arguing that mandatory crop assessments are preempted by the federal Agricultural Fair Practices Act ["AFPA"], 7 USC 2301 *et seq.*

The trial court ruled in Petitioners' favor, finding that the Michigan Apple Committee is a producers' association subject to AFPA prohibitions to the extent that growers may decide whether to participate in a state's promotional program.

The Michigan Court of Appeals reversed, finding no preemption, because the Michigan Act was exempt from AFPA as an "existing state law", 7 USC 2305(d). The Michigan Act took effect on March 31, 1966, whereas AFPA was enacted by Pub L 90-288 on April 16, 1968. *Old Orchard Brands, Inc* v *Dept of Agriculture*, 152 Mich App 274 (1986).

The Michigan Supreme Court denied leave to appeal, 426 Mich 872 (1986).

ARGUMENT

A. 7 USC 2305(d) WAS ENACTED SO THAT NO EXISTING STATE LAW WOULD BE SUPERSEDED OR PREEMPTED BY AFPA.

The Michigan Agricultural Commodities Marketing Act, MCL 290.651 *et seq;* MSA 12.94(21) *et seq*, enacted in 1965 and taking effect March 31, 1966, authorizes Michigan producers of agricultural commodities to adopt promotional programs, funded by producer assessments, to

stimulate increased consumption of the particular food product through advertising, research, market development and information. Under this law, commodity programs have been established for: apples, asparagus, cherries, dairy products, onions, plums, soybeans and veal. The purpose of these programs is to enhance the economic position of the farmers through expanded markets.

Similar promotional commodity boards funded by producer assessments have been established in most agricultural states. Harl, 12 Agricultural Law § 113.04 (1983).

The Agricultural Fair Practices Act of 1967, Pub. L. 90-288, 82 Stat 93, 7 USC 2301 *et seq*, was signed into law on April 16, 1968. This Court has found that AFPA:

> "... protects the right of farmers and other producers of agricultural comodities to join cooperative associations through which to market their products ... Although the Act's principal purpose is to protect individual producers from interference by processors when deciding whether to belong to a producers' association, the Act also protects the producer from coercion by associations of producers. The AFPA thus provides that it is unlawful for either a processor or a producers' association to engage in practices that interfere with a producer's freedom to choose whether to bring his products to market himself or to sell them through a producers' cooperative association."[1]

From this Court's declaration of AFPA's purpose, Respondents are unaffected by AFPA because they are neither a cooperative association nor a producers' association as defined, and their advertising, promotional public-

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[1]

Michigan Canners & Freezers Assoc v Agricultural Marketing & Bargaining Bd, 467 US 461, 464, 104 S Ct 2518, 81 L Ed 2d 399 (1984).

ity and research activities clearly do not impinge upon or "interfere with a producer's freedom to choose" how products are brought to market, or the price received. Respondents do not engage in exclusive bargaining over marketing contracts, so are not subject to the prohbitions AFPA addresses.

AFPA contains a noteworthy exception for "existing state law", which is dispositive of this case. 7 USC 2305(d) provides in pertinent part:

> "The provisions of this chapter shall not be construed to change or modify existing State law nor to deprive the proper State courts of jurisdiction."

This Court addressed this language in its *Michigan Canners and Freezers* decision, 467 US at 469:

> "The AFPA contains no pre-emptive language; nor does it reflect a congressional intent to occupy the entire field of agricultural-product marketing. Indeed, the Act states that it 'shall not be construed to change or modify existing State law.' 7 USC § 2305(d)."

In determining the scope of a statute, this Court looks first to its language. If the statutory language is unambiguous, in the absence of clearly expressed legislative intent to the contrary, that language is ordinarily regarded as conclusive. *United States* v *Turkette*, 452 US 576, 580, 101 S Ct 2524, 69 L Ed 2d 246 (1981).

This court will examine legislative intent as an aid to statutory construction. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the committee reports on the bill." *Garcia* v *United States*, 469 US 70, 76, 105 S Ct 479, 83 L Ed 2d 472 (1984).

The "existing state law" exemption in AFPA was not part of the original bill, but added by amendment. The House Committee on Argiculture explained its amendatory action:

> "This amendment was adopted to clarify the committee's intent that no State law should be superseded or preempted by this legislation which is supplementary to and not in replacement of all other existing legal remedies." H.R. Rep 824, 90th Cong, 1st Sess 4 (1967).

The House Committee's wording expanded upon the much narrower substitute amendment to S 109 that had passed the Senate, and which had provided in Section 6(e): "The foregoing provisions shall not be construed to deprive proper state courts of jurisdiction." S 109, 90th Cong, 1st Sess. Thus, it is clear that Congress not only wanted to preserve existing state law but also sought to maintian a favorable climate for state regulation in the future.

In conclusion, 7 USC 2305(d) provides that existing state law is not preempted. The Michigan Act was enacted in 1965, three years prior to passage of AFPA. Accordingly, the Michigan Act is preserved by 7 USC 2305(d).

B. SIMILAR NON-PREEMPTIVE LANGUAGE IS COMMON TO FEDERAL LAW.

The language exempting state law from federal preemption is not unique to AFPA. Similar provisions are found in many federal acts. For brevity, Respondents urge the Court's consideration of:

Civil Obedience Act of 1968, 18 USC 233
Consumer Credit Protection Act, 15 USC 1610(b)
Extortionate Credit Transactions Act, 18 USC 896
Fair Housing Act, 42 USC 3615
Mine Safety and Health Act, 30 USC 955 [12]

For example, in enacting the Federal Truth in Lending Act, Congress has deferred to state regulation of consumer credit rates. *Aldens, Inc* v *Ryan*, 454 F Supp 465, 476 (WD OK, 1976), struck down a challenge to Oklahoma interest rates by a national retailer:

> "Moreover, Congressional deference to State interest regulation as expressed by 15 USC § 1610(b) must again be considered. Congress has paramount authority to regulate commerce between the states. It has deferred to State regulation of interest rates."

Accordingly, the exemption afforded state law in AFPA is consistent with Congressional action in other laws.

The major thrust of Petitioners' argument is that 7 USC 2305(d) was meant only to preserve state statutory provisions consistent with AFPA. Respondents reply that neither the language nor the legislative history of the amendment that became 7 USC 2305(d) contain any such limitation.

Moreover, when Congress has intended such a result, the language of the preservation clause so indicates. For example, the same 90th Congress passed the Civil Obedience Act of 1968 and the Fair Housing Act, both with

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[12] Text of these statutes is set forth in the Appendix.

non-preemptive sections.[3] Each is worded so as to express specific Congressional intent that state law on the same subject matter is preserved providing it is consistent with the federal act.

If Congress had intended the same result in AFPA, then the language of 7 USC 2305(d) would so indicate. Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent. *Andrus* v *Glover Construction Co*, 446 US 608, 616-617, 100 S Ct 1905, 64 L Ed 2d 548 (1980).

From the language and legislative history of 7 USC 2305(d), it is obvious that Congress intended to exempt all existing state law from the scope of AFPA.

C. RESPONDENTS' COMMODITY PROMOTION ACTIVITIES ARE SIMILAR TO THOSE AUTHORIZED BY THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Petitioners erroneously characterize Respondents' promotional activities as analogous to the exclusive agency bargaining over marketing contracts struck down in *Michigan Canners & Freezers, supra*. More appropriately, Respondents' activities bear closer resemblance to the promotional features of federal marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 USC 601 *et seq*.[4] That act authorizes federal marketing agreements and marketing orders to maintain orderly marketing conditions in interstate commerce for agricultural commodities.

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[3] 12 USC 233 and 42 USC 3615.

[4] Most federal marketing orders are set forth in 7 CFR.

Federal marketing orders may require mandatory payment of assessments to pay for expenditures to support advertising, research and market development. 7 USC 608c(6)(I). State programs have been specifically exempted by the following language from 7 USC 608c(6)(I):

> "Provided further, that the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity."

Respondents contend that the existence of federal agricultural marketing orders, with many featuring mandatory assessments partially used to finance advertising, market development and research, and many dating from before passage of AFPA, demonstrate a Congressional awareness of these programs with no express intent that AFPA invalidate this long history of federal involvement in agriculture.

The inclusion of the specific non-preemption language in 7 USC 608c(6)(I) further demonstrates Congress' intent to leave the states free to provide for their own agricultural promotion, such as the Michigan Act under scrutiny here. It is clear that the non-preemption clause in AFPA, 7 USC 2305(d), is consistent with the similar provision in the Agricultural Marketing Agreement Act of 1937.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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A. Civil Obedience Act of 1968, 12 USC § 233

Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof.

B. Consumer Credit Protection Act, 15 USC § 1610(b)

This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

C. Extortionate Credit Transactions, 18 USC § 896

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

D. Fair Housing Act, 42 USC § 3615.

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extend be invalid.

E. Mine Safety and Health Act, 30 USC § 955.

(a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect on December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard shall not be held to be in conflict with this chapter.